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No. 02-626

IN THE

Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR *AMICI CURIAE* FLORIDA FRUIT AND VEGETABLE ASSOCATION, FLORIDA FARM BUREAU FEDERATION, AMERICAN FAM BUREAU FEDERATION, and CHARLES H. BRONSON, as the FLORIDA COMMISSIONER OF AGRICULTURE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the National Pollutant Discharge Elimination System ("NPDES"), 33 U.S.C. § 1342, component of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, authorizes state programs to address nonpoint sources of pollution not covered by the NPDES program.

2. Whether the Eleventh Circuit's decision would have the effect of overriding the agricultural exemptions of the Clean Water Act and the NPDES program.

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With the written consent of the parties given and filed with the Clerk of the Court, the American Farm Bureau Federation ("Farm Bureau"), Florida Farm Bureau Federation ("FFBF"), the Florida Fruit and Vegetable Association ("FFVA"), and Charles H. Bronson, the Florida Commissioner of Agriculture of the State of Florida ("Commissioner") respectfully submit this brief as amici curiae[1].

[1] Counsel for *amici curiae* has authored this brief in whole and no other person or entity other than *amici*, its members or counsel have made a monetary contribution to the preparation or submission of the brief.

INTEREST OF *AMICI CURIAE*

The FFVA is a non-profit, agricultural trade organization headquartered in Orlando, Florida. Its mission is to enhance the competitive and business environment for producing and marketing fruits, vegetables, and other crops. The FFVA represents and assists its membership on a broad range of farming issues, including environmental protection, marketing, labor, food safety, and pest management. These services help Florida growers set the standard for competitively producing an abundant supply of safe and affordable, fruits, vegetables and other crops. Its members produce much of the winter vegetable crop for the United States.

The Farm Bureau is a not-for-profit, voluntary general farm organization incorporated in Illinois in 1920. It was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. Farm Bureau has member organizations in all 50 states and Puerto Rico, representing more than five million member families.

FFBF is one of the constituent members of the Farm Bureau. It represents the interests of farmers and ranchers in Florida. FFBF is composed of 62 county farm bureaus with more than 143,400 member families. It is headquartered in Gainesville, Florida.

American farmers and ranchers represented by the FFVA, FFBF, and the Farm Bureau own or lease significant amounts of property on which they depend for their livelihoods and upon which Americans rely for food and fiber and other basic necessities. Farmers and ranchers are increasingly becoming subject to restrictive regulations at the local, state and national levels that impair their ability to farm, and in some instances, eliminate that ability altogether.

The Commissioner supervises all matters pertaining to agriculture in the State of Florida, pursuant to Article IV, Section 4(f) of the Florida Constitution, except as otherwise provided by law. The Commissioner is also the head of the Florida Department of Agriculture and Consumer Services ("DACS") under Section 20.14(1), Florida Statutes (2002), and is statutorily charged with the duty to "protect the agricultural and horticultural interests of the state" under Section 570.07(13), Florida Statutes (2002).

The Florida Legislature has declared the production of agricultural commodities in this state to be a "large and basic industry that is important to the health and welfare of the people and to the economy of the state." § 604.001(2), Fla. Stat. (2002). The Legislature has further declared that it is important "that additional problems are not created for growers and ranchers engaged in the Florida agricultural industry by laws and regulations that cause, or tend to cause, agricultural production to become inefficient or unprofitable." § 604.001(5), Fla. Stat. (2002). Finally, under Sections 570.074-.075, Florida Statutes (2002), the Commissioner has created and oversees an Office of Agricultural Water Policy ("OAWP") for the purpose of engaging in any matter "relating to water policy affecting agriculture, application of such policies, and coordination of such matters with state and federal agencies."

The Commissioner's participation in this matter flows from his constitutional and statutory duty to protect Florida agricultural food products and the interests of all Florida citizens involved in or affected by issues impacting the continued viability of agricultural operations in the state.

American farm products remain competitive in the world market due in part to the regulatory scheme of one environmental law, the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387. The CWA does this by providing agricultural exemptions for the discharge of waters used for the pro-

duction of crops. 33 U.S.C. §§ 1342(l) and 1362(14). These exemptions are part of the National Pollutant Discharge Elimination System ("NPDES") component of the CWA, a permit program to limit the discharge of industrial wastes into the nation's waters. 33 U.S.C. § 1342.

If the Eleventh Circuit's decision stands, the South Florida Water Management District ("SFWMD") will have to increase its budget to pay for the expensive NPDES permitting process for S-9, the pump station that moves water from one side of a levee to the other in the same watershed. SFWMD will more than likely obtain the funding to obtain and implement this NPDES permit by increasing agriculture privilege taxes, ad valorem taxes on property owners in the district, fees, and assessments. *See, e.g.*, § 373.4592(6), Fla. Stat. (Supp. 2003) (agricultural privilege tax) and § 373.503, Fla. Stat. (*ad valorem* tax). The costs may be further magnified by the SFWMD having to take steps to permit many other structures or facilities similarly situated to the S-9 facility.

These likely additional costs to farmers and ranchers would significantly and adversely impact the ability of farmers and ranchers in Florida to competitively market their crops in today's international markets. It is possible the technologies required by the NPDES permit for S-9 will compel the creation of stormwater treatment areas for it and other similar types of facilities. If that is the case, SFWMD may use its condemnation power to take the land of farmers and ranchers, thereby further adversely impacting them.

The Commissioner and the farmer and rancher members in the FFVA and FFBF have a direct economic interest in the outcome of this case. The interest is to ensure the agricultural exemptions provided by the Clean Water Act from the NPDES program continue to be effectively implemented as in the past. If the Eleventh Circuit's decision is not reversed, the effective impact of the Clean Water Act agricultural

exemptions could be eroded and thwarted through increased taxes, fees and/or assessments imposed by SFWMD to pay for NPDES permits and technologies for the S-9 pump station or similar facilities.

SFWMD's hundreds of other pumps and flow diversion facilities like them that move water within the same watershed will likely also require NPDES permits, all at a substantial cost the SFWMD will pass on to farmers, ranchers, and others. In addition, regulatory agencies that manage the transfer of water within watersheds throughout the country may also have to obtain NPDES permits if the Eleventh Circuit's decision is affirmed. Accordingly, the impact of the Eleventh Circuit's decision could adversely impact the cost of producing crops throughout Florida and nationally. The predictable result will be a diminished ability of American farmers and ranchers to market their crops in the international market in which they can now compete.

ARGUMENT

I. THE CLEAN WATER ACT AUTHORIZES STATE PROGRAMS TO ADDRESS NONPOINT SOURCES OF POLLUTION NOT COVERED BY THE NPDES PROGRAM.

A. Framework of the CWA

The NPDES program did not cover nonpoint sources when the CWA amendments were adopted in 1972. Instead, nonpoint sources were left to the states to address through planning processes. Pub. L. 92-500, § 208 (1972); 86 Stat. 816, 839-841, *codified as amended*, 33 U.S.C. § 1288; S. Rep. No. 414, 92d Cong., 1st Sess. 139, ("S. Rep. 92-414"), *reprinted in* 1972 U.S.C.C.A.N. 3668. As explained below, that is still true today.

Since its enactment, the CWA has divided water pollution sources into two categories, point and nonpoint. Point

sources are subject to the NPDES program, a federal permit scheme which is administered by the United States Environmental Protection Agency ("EPA") or by a state which has received EPA's authorization. *See* 33 U.S.C. §§ 1311 and 1342(a and b). The term "point source" is defined in 33 U.S.C. § 1362(14). Nonpoint sources are not subject to a CWA permit system. *Natural Resources Defense Council v. EPA,* 915 F.2d 1314,1316 (9th Cir. 1990).

Indeed, nonpoint sources are addressed under a separate scheme that recognizes their important differences. *See* 33 U.S.C. §§ 1288 and 1329. By the early 1970s Congress had realized that "[t]here is no effective way as yet, other than land use control, by which you can intercept that runoff and control it in the way you do a point source." 117 Cong. Rec. 38825 (1971) (Sen. Muskie). Since land use controls have historically been the concern of state and local government, Congress did not subject nonpoint sources to any federal regulation. As one court has explained, the 1972 Federal Water Pollution Control Act Amendments to the CWA:

> drew a distinct line between point and nonpoint pollution sources. Point sources are subject to direct federal regulation and enforcement under the Act. 33 U.S.C. § 1342. Nonpoint sources, because of their very nature, are not regulated under the NPDES. Instead, Congress addressed nonpoint sources of pollution in a separate portion of the Act which encourages States to develop area wide waste treatment management plans. See 33 U.S.C. § 1288 [footnotes omitted] . . .

Oregon Natural Resources Council v. Untied States Forest Service, 834 F.2d 842, 849 (9th Cir. 1987); *see also United States v. Earth Sciences, Inc.*, 599 F.2d 368, 371-73 (10th Cir. 1979) (nonpoint sources are not subject to a "regulatory system"). Congress revisited the matter of nonpoint sources regulation in 1977, and decided to "continu[e] the section 208, 33 U.S.C. § 1288 experiment . . . judging that these

[nonpoint source] matters were appropriately left to the level of government closest to the sources of the problem." 123 Cong. Rec. 26697 (1977).

This minimal federal involvement with nonpoint sources under Section 208 of the CWA, 33 U.S.C. §1288, was broadened somewhat in 1987 with the addition of Section 319, 33 U.S.C. § 1329, Nonpoint Source Management Programs. Section 319 continues to recognize that nonpoint source control is first and foremost a matter of land use control, and continues to respect state primacy in that field. Under Section 319, states are directed to prepare "management programs" that identify "best management practices" for various categories of nonpoint sources. 33 U.S. C. § 1329(b). Each management program must identify "best management practices which will be undertaken to reduce pollutant loading" and how the program will "achieve implementation" of them. 33 U.S.C. § 1329(b)(2)(A and B).

The CWA creates a framework that accommodates the interests Congress had to balance when it addressed point and nonpoint sources and their effects on water quality. It brings the full regulatory authority of the federal government to bear on point sources; it leaves nonpoint sources to state and local governments. Control of nonpoint sources inevitably implicates land use controls and accordingly Congress deferred to state and local primacy in that area. Congress struck a balance on this issue, as it does routinely on legislation of all kinds. That balance divides responsibility for point and nonpoint sources between EPA and the states, respectively.[2]

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[2] Prevailing views of federalism evolve over time, but the problems of environmental regulation within a federal framework, as the sometimes complex compromises that emerge, are nothing new. See Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196 (May 1977).

Nonpoint sources must do their part, but through state-driven programs.

B. Conservation—National View

The Farm Security and Rural Investment Act of 2002, Pub. L. 107-171, 116 Stat. 134-540 ("Farm Act"), supported large funding increases in conservation programs to assist farms of all sizes improve water quality. The Farm Act increased funding for almost every existing agri-environmental program. Overall spending for conservation and environmental programs will rise by 80 percent to a projected 10-year total of $38.6 billion. This funding responds to a broad range of natural resource challenges faced by farmers and ranchers and will focus on the soil, water and air impacts of farming.

The Environmental Quality Incentives Program ("EQIP") of the Farm Act, 116 Stat. 253-258, *codified as amended*, 16 U.S.C. §§ 3839aa-3839aa-9, provides technical and financial assistance to landowners to improve soil, water, air, wetlands and wildlife management. Started in the 1996 at $200 million annually, the increased demand for the program by farmers resulted in the expansion of total funding to $5.8 billion through 2007.

A new approach authorized in the Farm Act is to provide technical and financial assistance for the conservation and protection of natural resources on private working lands. The Conservation Security Program of the Farm Act offers assistance to all producers who practice good stewardship on their farms and provides incentives to help cover the costs for those who want to add additional conservation practices. 116 Stat. 225-230, *codified as amended,* 16 U.S.C. § 3838a. These and many other United State Department of Agriculture natural resource conservation programs follow the voluntary, incentive-based model that farmers have supported starting with the soil conservation programs of the 1930's.

Approaches that include the agricultural community in their design and execution, that are based on local decision-making, and that produce results while complementing the goals of the farm business, have proven useful in achieving natural resource protection for agriculture. Producing food and fiber for the nation and the world, improving environmental practices on working lands, and maintaining a sound economic base for current and future farm businesses are the multiple goals that farmers and the public are striving to achieve.

C. Florida Programs Addressing Nonpoint Sources of Pollution

As set forth above, the CWA authorizes states to develop and implement plans to address nonpoint sources (*e.g.* 33 U.S.C. §1329(b)(2)(B)—states develop best management practices and measures to reduce pollutant loading; and 33 U.S.C. §1329(h)(2)—federal grants are provided for state programs addressing nonpoint-source pollution) and in some instances requires states to implement controls on these sources (*e.g.*, 33 U.S.C. §1342(d)—states must limit the total maximum daily loads of pollutants discharged into impaired water bodies from nonpoint and point sources).

Pursuant to the CWA, the Florida Legislature has adopted several programs to address the introduction of pollution into navigable waters from nonpoint sources. In addition, regional cooperative programs have similarly implemented procedures for this purpose. Several of these programs are described below. The Commissioner, agricultural interests, and others have worked cooperatively to implement these programs through the establishment of best management practices ("BMPs"). The goal of these cooperative efforts is to limit the flow of pollutants into navigable waters, whether from point or nonpoint sources.

1. *Florida's TMDL Program*

The Florida Watershed Restoration Act, Section 403.067, Florida Statutes, was adopted by the Florida Legislature in 1999. Implementation of this law is expected to result in cleaner water though collaborative restoration efforts, better protection of water bodies, and better working relationships among public and private sectors to reduce pollution. Substantial funding is being provided by the Legislature to implement the act. To accomplish these purposes, the law requires the establishment of the total maximum daily load ("TMDL") of pollutants that can flow into impaired surface waters or segments. A TMDL is a calculation of the maximum amount of a pollutant that a water body can receive and still meet water quality standards, and an allocation of that amount to the pollutant's sources. *See* § 403.031(21), Fla. Stat. (2002). This program is mandated by the NPDES program of the CWA. 33 U.S.C. § 1342(d) ("Section 303(d)").

The Florida Department of Environmental Protection ("FDEP") is the lead agency to implement the TMDL law. In that capacity, it adopted comprehensive impaired water rules in 2001. Ch. 62-303, Fla. Admin. Code. These rules became effective on June 10, 2002, when they were upheld in a 468-page final order; the order was affirmed on appeal in 2003. *Lane et al. v. Florida Department of Environmental Protection*, Case Nos. 1D02-2043 and 1D02-2319 (Fla. 1st DCA, May 20, 2003). FDEP had previously adopted a list of impaired waters ("Section 303(d) list"), as required by the CWA; EPA Region 4 approved this list in 1998. This list will be updated using the assessment standards in the recent TMDL law and implementing rules. §403.067(2-5), Fla. Stat.

The Florida TMDL program also requires FDEP to calculate TMDLs, allocate TMDLs, and verify the effectiveness of proposed BMPs to reduce pollution in impaired waters or segments. The program specifically addresses agriculture-related water quality problems in Section 403.067(7)(d),

Florida Statutes (2002). This provision allows voluntary, incentive-based agriculture-related programs which reward implementation of BMPs. It authorizes the Florida Department of Agriculture and Consumer Services ("DACS") to develop alternative processes (other than having a TMDL developed) and regulatory approaches to achieve water quality improvement through the reduction of agricultural-related pollutants. Section 403.067(7)(d) has enabled the Commissioner and many local agencies and regulated interests (including FFVA and the FFBF) to work cooperatively together to develop agriculture-related BMPs and programs. If farmers and ranchers implement BMPs verified by FDEP, they receive "a presumption of compliance with state water quality standards". § 403.067(7)(d)(1), Fla. Stat. (2002).

One of the prioritized impaired water bodies on FDEP's 303(d) list is Lake Okeechobee. The Florida Legislature adopted a special law to address the reduction of pollutants flowing into this water body (see Section C(4), below).

2. *Florida's Office of Agricultural Water Policy*

The Office of Agricultural Water Policy ("OAWP") is part of the Florida Department of Agriculture and Consumer Services ("DACS"). It was established in 1995 by the Florida Legislature to facilitate and improve communications between federal, state, local agencies and the agricultural industry on water quantity and quality issues. *See* §§ 570.074-.075, Fla. Stat. (2002). OAWP is actively involved in the development of BMPs on a site-specific, regional and watershed basis. OAWP works cooperatively with agricultural producers and industry groups, FDEP, the university system, the water management districts, and other interested parties to develop and implement BMP programs that are economically and technically feasible. OAWP has a staff of 37 employees, including six technical field teams and 18 professionals. This staff has expertise in disciplines including soil and water conservation, resource management,

environmental regulation, biology, ecology, engineering and GIS. Following are some examples of BMPs implemented through OAWP programs.

OAWP facilitated the adoption of BMPs for the Indian River citrus groves in seven counties, including Okeechobee County. Ch. 5M-2, Fla. Admin. Code. Rule 5M-2.002 incorporates by reference the document, titled Water Quality/ Quantity BMPs for Indian River Area Citrus Groves (May 2000), which contains the BMPs. Indian River growers have voluntarily enrolled 179,843 acres in this program, covering 82% of potential acreage. OAWP has similarly coordinated the development of nitrogen BMP rules for Florida Ridge Citrus (covering ten counties) and Leatherleaf Fern growers. Rule 5E-1.023(4)(a and b), Fla. Admin. Code.

OAWP has also facilitated the development of BMP manuals for silviculture, cow/calf, blended fertilizer plants, aquaculture, and agrichemical equipment. The BMP rule for citrus, cow/calf, dairies and other agriculture in the Lake Okeechobee priority basins has been noticed for adoption. Ch. 5M-3, Fla. Admin. Code; *see* 29 Fla. Admin. Weekly 3328-3329 (Aug. 22, 2003). Even before the adoption of the TMDL law, OAWP assisted in the development of BMPs along the Suwannee River (*see* Section C(3) below).

3. *Suwannee River Partnership*

The Suwannee River Partnership ("Partnership") is a coalition of 24 state, federal and regional agencies, local governments, and private industry representatives formed in 1999 to work together to reduce nitrate levels in the surface waters and ground water within the watershed. Partners include the DACS, FFBF, FDEP, Florida Department of Health, EPA, United States Department of Agriculture, University of Florida Institute of Food and Agricultural Sciences, Extension and Research, Florida Agriculture and Mechanical University, College of Engineering Sciences,

Technology, and Agriculture, Florida Cattlemen's Association, Florida Forestry Association, Florida Septic Tank Association, Gold Kist, Inc., and Sunshine State Milk Producers. In 2003, the Partnership expanded to include the Santa Fe River Basin.

The Partnership determines the sources of nutrient loads to these river basins and then develops voluntary incentive-based programs to minimize nutrient loading. Through these voluntary efforts, nitrate levels have been substantially reduced in the Middle Suwannee and Santa Fe River basins. Initially, technical committees developed specific plans to reduce nutrient loading to the water resources through the management of fertilizers, animal wastes and human waste, monitoring, and education and outreach. The group focused on finding the most economical and technologically feasible management techniques (BMPs) available to help farmers and other land users satisfy regulatory requirements for protecting public health and the environment. In its third year (2002), the Partnership developed "reasonable assurance" documentation to demonstrate to the satisfaction of FDEP and EPA that its watershed management programs address water quality concerns in the Suwannee River basin. Farmers who use the BMPs adopted by the Partnership can receive a presumption of compliance with Florida's TMDL law. §403.067(7)(d)(1), Fla. Stat. (2002). Some of the BMPs have been adopted as rules. *See* Rule 5E-1.023(5)(b), Fla. Admin. Code.

In 2002, over 1000 growers and producers attended one or more of the many meetings and special events hosted by the Partnership. The Natural Resources Conservation Service provides technical assistance and incentives for farmers to implement effective BMPs through the Small Watershed Program and the Environmental Quality Incentive Program, both programs in the Farm Act of 2002. 116 Stat. 274, *codified as amended*, 16 U.S.C. § 1012(h); and 116 Stat. 253-

258, *codified as amended*, 16 U.S.C. §§ 3839aa-3839aa-9. These programs have provided $17 million in cost-share funding to implement water quality oriented BMPs. The Partnership researches the effectiveness of BMPs through its BMP Effectiveness 319 Demonstration Project at three separate commercial agricultural operations.

4. *Florida's Lake Okeechobee Protection Program*

In 2000, the Florida Legislature enacted the Lake Okeechobee Protection Program. § 373.4595, Fla. Stat. (2002). The program's purpose is the protection and restoration of Lake Okeechobee and the protection of public water resources in the Lake Okeechobee watershed. By this enactment, the state recognized the prioritized status of Lake Okeechobee on the Section 303(d) list. The program's coordinating agencies are DACS, SFWMD, and FDEP. The United States Army Corps of Engineer's Central and Southern Florida Flood Control Project manages this responsibility, under the local sponsorship of SFWMD. § 373.1501, Fla. Stat. (2002).

Under this program, an integrated watershed and Lake Okeechobee management strategy is being developed. Professionals believe the use of BMPs as part of a voluntary, non-regulatory process, should effectively control phosphorus when implemented at the parcel-scale level. At this level, individual landowners will reduce the amount of phosphorus migrating off their parcels of land. OAWP is also working with other agencies and agricultural interests to develop a voluntary program for other agricultural activities including cow/calf operations, vegetables, and citrus, modeled on the success of the citrus BMP efforts in the Indian River Lagoon watershed (*see* Section C(2), above).

The Lake Okeechobee Watershed Phosphorus Control Program, a component of the program, is described in Section 373.4595(3)(c), Florida Statutes (2002) as:

> a multifaceted approach to reducing phosphorus loads by improving management of phosphorus sources within the Lake Okeechobee watershed through continued implementation of existing regulations and best management practices, development and implementation of improved best management practices, improvement and restoration of the hydrologic function of natural and management systems, and utilization of alternative technologies for nutrient reduction . . .

The Commissioner and agricultural interests work cooperatively to develop rules which identify BMPs and best available technologies for nonpoint agricultural sources in the Lake Okeechobee watershed. § 373.4595(3)(c), Fla. Stat. (2002) The program provides that DACS in consultation with other agencies "shall institute a reevaluation of the best management practices and make appropriate changes" when "water quality problems are detected for agricultural nonpoint sources despite the appropriate implementation of adopted best management practices." § 373.4595(3)(c)(1)(d), Fla. Stat. (2002).

5. *Florida's Everglades Forever Act*

The 1994 Everglades Forever Act ("EFA") has been approved by EPA as a part of Florida water quality standards. § 373.4592, Fla. Stat. (Supp. 2003). In the Everglades Agricultural Area ("EAA"), the EFA requires the implementation of BMPs. § 373.4592(4)(f), Fla. Stat. (Supp. 2003). The Everglades agricultural privilege tax imposed on Everglades agriculture provides incentive credits against this tax to encourage farmers and ranchers to use BMPs to reduce phosphorus loads. § 373.4592(6)(c)(2), Fla. Stat. (Supp. 2003). Credits can be earned if they reduce total phosphorus runoff from their land by at least 25%. §373.4592(6)(c)(3),

Fla. Stat. (Supp. 2003); *see also* Ch. 40E-63, Parts III and IV (Everglades Program—BMP Research, Testing and Implementation and C-139 Basin), Fla. Admin. Code. Recently, SFWMD announced a 35% phosphorus reduction from the water exiting the EAA south of Lake Okeechobee from C-139 basin.

There are many components in the EFA's complex system managing the water in the Lake Okeechobee watershed, one of which is the S-9 pump. S-9 operates in compliance with a permit issued by FDEP under the EFA. § 373.4592(9)(k and l), Fla. Stat. (Supp. 2003).

6. *Summary*

In view of the above, Florida is implementing varied and complex mechanisms (*e.g.* TMDLs and BMPs) to protect and restore Florida's water bodies. The Lake Okeechobee and Everglades watershed is the beneficiary of many of these cooperative programs designed to address nonpoint sources of pollution. Accordingly, there is no need, or authority, to ignore state primacy as clearly provided in the CWA. Yet that is the effect of the Eleventh Circuit's decision.

II. THE ELEVENTH CIRCUIT'S DECISION WOULD HAVE THE EFFECT OF OVERRIDING THE AGRICULTURAL EXEMPTIONS PROVIDED BY THE CLEAN WATER ACT AND THE NPDES PROGRAM.

A. Agricultural Exemptions

The CWA prohibits the discharge of pollutants into the navigable waters of the United States unless the discharge is allowed by the NPDES component of the CWA. 33 U.S.C. § 1311(a); *see Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1524-1525 (11th Cir. 1996). Permits for discharges into the nation's waters are issued by EPA or by delegated state

permitting programs. 33 U.S.C. §§ 1342(a) & 1342(c). EPA authorized FDEP to administer the NPDES program in 1995. § 403.0885, Fla. Stat. (2002).

The NPDES program does not require permits for the introduction of pollutants into the waters of the United States that are the result of exempt agricultural activities. The CWA expressly provides exemptions for these agricultural discharges. 33 U.S.C. §§ 1342(l) and 1362(14). The FFVA, FFBF, Farm Bureau, and Commissioner seek to prevent a fundamental change in the implementation of these agricultural exemptions which the Eleventh Circuit's expansive decision appears to authorize contrary to the CWA.

The NPDES program limits the flow of pollutants into the nation's waters by regulating discharges from "point sources." Certain agricultural discharges are excluded by definition from regulation by the NPDES program because they are not "point sources". A "point source" regulated by the NPDES program is defined in 33 U.S.C. §1362(14) as follows (emphasis added):

> The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. *This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.*

The NPDES program expressly prohibits any permit requirements for these agricultural discharges, stating in 33 U.S.C. § 1342(l):

> The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly require any State to require such a permit.

The rules implementing the agricultural exemptions explain what is and is not a "point source" under the statutory definition of the NPDES program. The rules provide, for example, that the following discharges from agriculture do not require NPDES permits:

> Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands. . . .

40 C.F.R. § 122.3(e)

B. Legislative History of the Agricultural Exemptions

The CWA originated in the 1972 amendments to the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* The CWA focused on regulating "point source" discharges which flow into the nation's navigable waters. The 1972 amendments required effluent limitations to be placed upon "point source" discharges through a federally mandated permit system, the NPDES program. Pub. L. 92-500, § 402; 86 Stat. 816, 880-883 (1972), *modified as amended* 33 U.S.C. § 1342.

The NPDES program did not cover nonpoint sources when the CWA was adopted in 1972. Instead, these sources, particularly agriculture, were left primarily to the states to address through a planning process described in the program. Pub. L. 92-500, § 208 (1972); 86 Stat. 816, 839-841, *codified as amended*, 33 U.S.C. § 1288; S. Rep. No. 414, 92d Cong., 1st Sess. 139, ("S. Rep. 92-414"), *reprinted in* 1972 U.S.C.C.A.N. 3668. As a consequence, when Congress adopted the NPDES program, it did not require a permit for agricultural runoff. Pub. L. No. 92-500, § 208(b)(2)(F), 86 Stat. 816, 841 (1972), *codified as amended*, 33 U.S.C. § 1288(b)(2)(F); S. Rep. 92-414, *reprinted in* 1972 U.S.C.C.A.N. at 3759-3760. As Senator Dole stated: "This

bill would amend the Federal Water Pollution Control Act to place responsibility on the states for instituting and expanding the control of water pollution related to agriculture." S. Rep. 92-414 at 3759 (supplemental views of Sen. Dole).

In 1977, the exemption for "return flows from irrigated agriculture" was expressly added as an exclusion from the definition of "point source". Pub. L. 95-217, § 33(b); 91 Stat. 1577 (1977), *codified as amended* 33 U.S.C. § 1362(14). Also, the provision prohibiting NPDES permits for agricultural discharges was added. Pub. L. 95-217, § 33(c); 91 Stat. 1577 (1977), *codified as amended* 33 U.S.C. § 1342(l). The express exclusion from the definition of "point source" overrode a 1975 federal district court opinion holding the 1972 amendments to the Federal Water Pollution Control Act did not exclude point sources from agriculture from NPDES permitting. *Natural Resources Defense Council, Inc. v. Train*, 396 F. Supp. 1393, 1402 (D.D.C. 1975), *affirmed sub nom. Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1382 (D.C. Cir. 1977). The legislative history reveals Congressional intent that all sources of agricultural runoff, "regardless of the manner in which the flow was applied to the agricultural lands, and regardless of the discrete nature of the entry point, are more appropriately treated under the requirements of section 208(b)(2)(F)." S. Rep. No. 95-217, 95th Cong., 1st Sess. 35 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4360.

The exemption for "agricultural stormwater discharges" from the definition of "point source" was added by the Water Quality Act of 1987. Pub. L. No. 100-4, § 503; 101 Stat. 7, 75 (1987), *codified as amended*, 33 U.S.C. § 1462(14). By this exemption, Congress confirmed its intent that agriculture is not covered as industrial or municipal pollution under 33 U.S.C. § 1342(p).

A recent Eleventh Circuit case interpreted and applied the agricultural exemptions from the NPDES program.

Fishermen Against the Destruction of the Environment, Inc. v. Closter Farms, Inc., 300 F.3d 1294 (11th Cir. 2002). In that case, Closter Farms irrigated sugar cane by irrigation canals, a process called flood irrigation. The canal water originates in Lake Okeechobee. It is forced from the canals "into the sugarcane fields by raising the water levels in the canals." *Id.* at 1297. The water is then discharged back into the lake. The grower also pumped its stormwater into Lake Okeechobee, rather than allowing it to follow its natural flow. The Eleventh Circuit held these discharges to the lake were covered by the agricultural exemptions from NPDES program regulation. As to the diversion of stormwater runoff to the lake, the court held: "Nothing in the language of the statute indicates that stormwater can only be discharged where it naturally would flow. *See* 33 U.S.C. § 1362(14)." *Id.* at 1297. The court also held that the canals used to irrigate the sugar cane fields through flood irrigation constituted an exempt activity; they were a "return flow from irrigation agriculture," and accordingly expressly exempt from the definition of "point sources" regulated by the NPDES program. 33 U.S.C. §1362(14).

C. Effect of Eleventh Circuit's Decision on the Agricultural Exemptions

If the Eleventh Circuit's decision is allowed to stand, SFWMD will have to treat the water pumped at S-9 in order to remove some of the pollutants in it, none of which have been added by SFWMD. This water may contain pollutants from agricultural discharges exempt by definition from the NPDES program's definition of "point source."

The treatment of water at S-9 will be expensive. Just the preparation of the NPDES application will be costly, requiring detailed data and modeling prepared by experts. In addition, SFWMD will have to construct and implement treatment and monitoring technologies required by the resulting NPDES permit, assuming there are such technologies.

SFWMD will bear the cost of the NPDES permitting process, as well as cost of the installation and monitoring technologies to treat the water at the S-9 pump station. The regulatory agency will have to pay for these substantial costs by increasing one or more of its funding sources. These sources include ad valorem taxes on properties within the SFWMD's jurisdiction, agricultural privilege taxes, permit fees, and assessments. *See, e.g.*, § 373.4592(6), Fla. Stat. (Supp. 2003) (agricultural privilege tax) and § 373.503, Fla. Stat. (2002) (*ad valorem* tax). Farmers and ranchers who own farms, groves and ranches in the jurisdiction of SFWMD may therefore have to pay for the removal of pollutants required by an NPDES permit for S-9, even though agricultural discharges to the waters pumped by S-9 are exempt from the NPDES permitting program. Consequently, the benefits of the agricultural exemptions may be effectively overridden by the Eleventh Circuit's decision.

The additional regulatory costs created by the NPDES permit for S-9 may be passed on to farmers and ranchers, and may increase the costs of producing agricultural products, resulting in a diminished ability to be competitive in the world market. As a consequence, the economic benefits realized from the agricultural exemptions would be substantially eroded. If the Eleventh Circuit's decision stands, S-9 will be just one of many SFWMD pumps that may be required to have NPDES permits. The adverse economic impact on farmers and ranchers could be enormous. If the decision is applied statewide and nationally, thousands of pumps operated by agencies transferring water within watersheds will similarly be required to pass on to farmers and ranchers the expensive costs of NPDES permitting.

CONCLUSION

The judgment of the Eleventh Circuit Court of Appeals should be reversed.

Respectfully submitted,

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